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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 142

THE FLYING TIGER LINE, INC.,

Petitioner,

—v.—

FREDERIC T. MERTENS, SR., Individually and as Administrator of the Estate of FREDERIC THORN MERTENS, deceased, and MARGARET S. MERTENS,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that this Court grant rehearing of its Order of October 11, 1965, denying the Petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case as prayed for in the Petition filed May 14, 1965, herein.

Reasons for Granting Rehearing and Issuing the Writ

1. The Court below, in its decision holding as a matter of law that the delivery of the passenger ticket in this case was inadequate within the meaning of Article 3(2) of the Warsaw Convention, found facts not based upon any evidence of record, and thereby usurped the function of the

jury in this case. By so doing, the Court below has deprived defendant of its right to a jury trial on this issue.

In its opinion, the Court below first construed Article 3(2) of the Warsaw Convention to "require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability." 341 F. 2d 851 at 856. The Court then held that the question of whether a ticket was delivered to a passenger in such manner "depends in each case on the particular factual circumstances. *It is a test that is to be applied by the jury on the evidence before it.*" 341 F. 2d 851 at 857. (Emphasis added) Finally, the Court concluded that a jury could not have reasonably found that the delivery of the ticket to plaintiffs' decedent was adequate, and therefore held as a matter of law that the delivery was inadequate and that the limitation of liability was inapplicable.

This conclusion of the Court below was based upon facts which it found, which had not been found by the jury and which, in any event, were no part of the evidentiary record in the District Court.

The Court of Appeals is not a fact-finding tribunal, and must be controlled in its decision solely by the facts contained in the record in the District Court. See, *Henneford* v. *Northern Pacific Ry. Co.*, 306 U. S. 17 (1938); *Brotherhood of Locomotive Firemen and Enginemen* v. *Northern Pacific Ry. Co.*, 274 F. 2d 641, 643 (8th Cir. 1960); *Holliday* v. *United States*, 244 F. 2d 801 at 802 (9th Cir. 1957); *United States* v. *Van Dusen*, 78 F. 2d 121 (8th Cir. 1935).

The specific facts found by the Court below in support of its decision and which are not based upon any evidence of record in this case, are set forth in the following excerpt from its opinion:

> "We also base our conclusion on the fact that presumably Lieutenant Mertens would have disobeyed orders if he left the material unaccompanied by disembarking after receiving the ticket to, for example, obtain flight insurance; and that the statement concerning the limitation of liability was printed in such a manner as to virtually be both unnoticeable and unreadable, especially in an aircraft about to take off. Under all these circumstances it could not be said that Lieutenant Mertens had a reasonable opportunity to take any measures to protect himself against the limitation of liability, regardless of the fact that the measures available to him might have been circumscribed because he was a military courier." 341 F. 2d 851 at 857.

There was no evidence whatsoever in this case that plaintiffs' decedent would have disobeyed orders, had he left the aircraft, after having received his passenger ticket, for any purpose, including the purchase of any insurance. The only testimony in this area was taken by the District Court in the absence of the jury, and the uncontroverted testimony was that plaintiffs' decedent could have disembarked to purchase insurance after having received his ticket, had he chosen to do so.

No evidence of any nature was introduced in the District Court relating to the noticeability or readability of the statement concerning the limitation of liability printed on the passenger ticket delivered to plaintiffs' decedent. A substantially identical document was received in evidence in the District Court, without objection, as plaintiffs' Exhibit 10. The statement in this Exhibit concerning the limitation of liability was clearly noticeable and readable, and the gratuitous comments of the Court below

in its opinion were based upon the appearance of a very poor photocopy printed in the Appendix used on the appeal. The writer of the opinion of the Court below declined an opportunity to examine the original Exhibit when offered at the oral argument.

In any event, the "facts" upon the basis of which the Court below concluded that the delivery of the ticket was inadequate as a matter of law, were newly found by the Court below, and in important respects were contrary to the only evidence of record relating to the same subject. By so doing, the Court below has deprived Petitioner of its right to a jury trial on the question of whether the ticket was delivered to plaintiffs' decedent in such a manner as to afford him a reasonable opportunity to take self-protective measures, *the very question which the Court below holds must be decided by the jury on the evidence before it.*

2. In holding that the jury could not have reasonably found that the delivery of the ticket to plaintiffs' decedent was adequate, the Court below has in effect granted a judgment notwithstanding the verdict on this issue, even though plaintiffs made no motion, pursuant to Rule 50(b), for such relief. Plaintiffs' only post-trial motion was pursuant to Rule 59 for a new trial.

Where a party fails to move in the District Court for a judgment notwithstanding the verdict, the Court of Appeals is precluded from the entry of a judgment notwithstanding the verdict, the maximum relief on appeal being the grant of a new trial. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947); *Quinby* v. *Morrow*, 340 F. 2d 584 (2d Cir. 1965); *Tri-State Ins. Co.* v. *United States*, 340 F. 2d 542 (8th Cir. 1965).

The District Court treated the issue of the adequacy of the ticket delivery as a question of law to be decided by the District Court. The only question of fact decided by the jury in this regard was whether any ticket at all was delivered. The jury answered this question affirmatively, and the District Court held the delivery to be adequate.

On appeal, however, the Court below has ruled that the adequacy of the ticket delivery is for the jury to decide upon the basis of all the circumstances. In this case, however, all of the circumstances were not before the jury because the District Court treated this issue as a question of law. Nevertheless, the Court below has proceeded to find its own facts, the more important of which (at least to the Court of Appeals) are not based on any part of the record in the District Court. Having found its own facts, the Court below next concluded that, under those facts, no jury could reasonably find that the delivery was adequate. Consequently, the Court below held as a matter of law that the delivery was inadequate.

In this manner, the Court below has assumed the role of fact-finder, has gone outside the record to find facts which it assumes would be required to be found by a jury on a trial, and has necessarily, but erroneously, concluded that there would be no evidence to contradict the findings of the Court below.

The procedure followed by the Court below in reaching its decision that the ticket delivery was inadequate is so far removed from the accepted and usual course of judicial proceedings that this Court should intervene and exercise its power of supervision.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

/s/ Austin P. Magner, Esq.

/s/ George N. Tompkins, Jr., Esq.
Counsel for Petitioner

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court, specifically, other substantial grounds available to petitioner although not previously presented.

/s/ George N. Tompkins, Jr.

Certificate of Service

I hereby certify that I have served a copy of the foregoing Petition for Rehearing upon counsel for respondents by mailing a copy thereof in a sealed envelope, first-class postage prepaid, addressed to Clarence Fried, Esq., counsel for respondents, 67 Wall Street, New York, New York 10005, this 4th day of November, 1965.

/s/ George N. Tompkins, Jr.

END